NO. 92-537

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GREAT LAKES DREDGE & DOCK COMPANY
AND STEAMSHIP MUTUAL UNDERWRITING
ASSOCIATION (BERMUDA), LTD.
Petitioners,

versus

DONALD GREGORY LINTON
AND TELETHIA LINTON
Respondents,

Petition for Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

Petition For Writ Of Certiorari
Of Great Lakes Dredge & Dock Company And Steamship Mutual Underwriting Association (Bermuda), Ltd.

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether Louisiana Code of Civil Procedure Article 1732(6), by permitting a seaman to withdraw his "at law" claim in state court and proceed "in admiralty" before a state district judge, violates Article III, § 2 of the United States Constitution which grants exclusive jurisdiction over admiralty and maritime matters to federal district courts?

II.

Whether the Fifth Circuit Court of Appeals improvidently remanded this "pure admiralty claim" to state court based on an erroneous interpretation of the federal removal statute, 28 U.S.C. § 1441?

III.

Whether a non-jury trial in state court is a remedy "saved" to suitors pursuant to 28 U.S.C. § 1333 or a remedy which is only available "in admiralty" in federal court before an Article III judge?

LIST OF PARTIES

The following are the parties who have an interest in this proceeding:

1. Donald Gregory Linton
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RULE 29 NOTIFICATION

Since the constitutionality of a state statute is drawn into question, 28 U.S.C. § 2403(b) may be applicable. Accordingly, the Attorney General of the State of Louisiana will be served with a copy of this pleading.

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DECISIONS BELOW

The Federal District Court for the Western District of Louisiana, Honorable Judge John K. Shaw, denied plaintiffs' Motion to Remand and issued a Ruling on August 27, 1990 and an Amended Ruling on October 16, 1990. These rulings are reproduced in Appendices B and C. The United States Court of Appeals for the Fifth Circuit reversed the district court's ruling on June 22, 1992 and the appellate decision is reproduced at Appendix A and its proper citation is 964 F.2d 1480 (5th Cir. 1992).

◆

JURISDICTION

This Petition seeks review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 22, 1992. The Petition is timely filed in accordance with the Federal Rules of Civil Procedure and Supreme Court Rule 13. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. The jurisdiction of the United States Court of Appeals for the Fifth Circuit was invoked pursuant to 28 U.S.C. § 1292(b).

◆

CONSTITUTIONAL PROVISIONS AND STATUTES PRESENTED FOR REVIEW

(1) The Merchant Marine Act (The Jones Act), 46 App. U.S.C. § 688(a) (West 1992):

(a) Application of Railway Employee Statutes; Jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; ...

(2) La. Code Civ. Proc. Art. 1732 (West 1988):

A trial by jury shall not be available in:

(1) A suit where the amount of no individual petitioner's cause of action excess twenty thousand dollars exclusive of interest and costs.

(2) A suit on an unconditional obligation to pay a specific sum of money, unless the defense thereto is forgery, fraud, error, want, or failure of consideration.

(3) A summary, executory, probate, partition, mandamus, habeas corpus, quo warranto, injunction, concursus, worker's compensation, emancipation, tutorship, interdiction, curatorship, legitimacy, filiation, annulment of marriage, or divorce proceeding.

(4) A proceeding to determine custody, visitation, alimony, or child support.

(5) A proceeding to review an action by an administrative or municipal body.

(6) A suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal "saving to suitors" clause, if the plaintiff has designated that suit as an admiralty or general maritime claim.

(7) All cases where a jury trial is specifically denied by law.

(3) U.S. Const., Art. III, § 2, Cl. 1. Jurisdiction of Courts:

Section 2. The judicial power of the United States shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and treaties made, or which shall be made, under their Authority; ...To all Cases of Admiralty and Maritime Jurisdiction; ...

(4) U.S. Const., 7th Amdt. - Civil Trials:

In Suits in common-law, with a value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common-law.

(5) 28 U.S.C. § 1333. Admiralty, Maritime and Prize Cases (West 1992):

The District Court shall have original jurisdiction, exclusive of the Courts of the State, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in call cases all other remedies to which they are otherwise entitled.

(6) Rule 9(h) **Admiralty and Maritime Claims.** A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rule 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes where so identified or not.

(7) 28 U.S.C. § 1441 (a) **Actions removable generally**. (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

STATEMENT OF THE CASE

On June 9, 1989, plaintiffs, Donald Gregory Linton and Telethia Linton, filed suit pursuant to the Jones Act, 46 U.S.C. § 688, and the general maritime law against Great Lakes Dredge & Dock Company ("Great Lakes") in the 16th Judicial District Court for the Parish of St. Mary. The Petition was later amended to name Steamship Mutual Underwriting Association (Bermuda), Ltd. ("Steamship Mutual"), the protection and indemnity club of which Great Lakes is a member, as a defendant.

On June 26, 1990, plaintiffs filed a Motion and Order for Leave to File a Fourth Supplemental and Amending Petition in state court specifically stating:

> Accordingly, for purposes of Louisiana Code of Civil Procedure, Article 1732(6), this suit is an admiralty or general maritime claim under a federal law that is brought in state court under a federal saving to suitors clause and is specifically designated as an admiralty or general maritime law claim. (Appendix D)

On June 27, 1990, the state district court granted plaintiffs' Motion and Order for Leave to File Fourth Supplemental and Amending Petition and this Order was served upon counsel for defendant on July 9, 1990. The state court's order also permitted withdrawal of plaintiffs' previous request for a jury trial under the Jones Act and general maritime law.

On July 27, 1990, defendants filed a Notice of Removal in the United States District Court for the Western District of Louisiana on the grounds that plaintiffs' Fourth Supplemental and Amending Petition, which specifically designated their claims as "pure admiralty claims," makes their cause removable pursuant to 28 U.S.C. § 1441 which provides:

> (a) Except as otherwise expressly provided by acts of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Since the district court has original and exclusive jurisdiction over maritime claims, the matter was properly removed. On August 27, 1990, the United States District Court for the Western District of Louisiana denied plaintiffs' motion to remand and issued an opinion holding:

> In the case at hand, in their Fourth Supplemental and Amending Petition, plaintiffs' designated their claims as admiralty or general maritime law claims pursuant to Louisiana Code of Civil Procedure Article 1732(6) and withdrew their previous request for jury trial. This article is the equivalent of Fed.R.Civ.P. 9(h) ...The defendants argue that once this designation was made, the plaintiffs effectively withdrew their request for a remedy under the savings to suitors clause and asserted an action within the exclusive federal admiralty jurisdiction, making the case removable pursuant to 28 U.S.C. § 1441. In view of the historical federal interest in creating a uniform body of maritime law, this court agrees. By making the Louisiana statutory counter part of what is essentially a Rule 9(h) declaration, the court believes that plaintiff essentially seeks a remedy in admiralty which the common law is not competent to give but which lies within the maritime jurisdiction reserved exclusively to the federal sovereign under the United States Constitution. (See Judge Shaw's Ruling and Amended Ruling at Appendices B and C.)

On October 6, 1990, the district court issued an amended ruling reaffirming its denial of plaintiffs' Motion to Remand but also stating that its order involved a controlling question of law

as to which there is substantial grounds for difference of opinion, thereby certifying the matter for appeal to the United States Court of Appeals for the Fifth Circuit. Plaintiffs then filed a Petition for Permission to Appeal pursuant to the provisions of 28 U.S.C. § 1292(b) and the Fifth Circuit granted plaintiffs' petition on December 6, 1990. On June 22, 1990, the Fifth Circuit reversed the ruling of the district court and issued an opinion and judgment remanding the matter to state court in Louisiana. The Fifth Circuit invoked its jurisdiction pursuant to 28 U.S.C. §1292(b).

Great Lakes Dredge & Dock Company points out that the case of Rowan Companies, Inc. v. Spencer Parker & Anthony Briley, 599 So.2d 296 (La. 1992) U.S. Supreme Court Docket No.: 92-221, is presently before this Court on a Petition for Writ of Certiorari to the Louisiana Supreme Court and involves similar issues with respect to the application of the Louisiana Code of Civil Procedure Article 1732 vis-a-vis Article III, § 2 of the United States Constitution.

ARGUMENT

1. Certiorari Should Be Granted To Prevent Louisiana State Courts From Developing Maritime Law Which Contravenes The Constitution.

This Court should grant certiorari to resolve the significant jurisdictional problem which will be created if the Fifth Circuit decision is upheld because Louisiana state district courts will effectively be permitted to provide "admiralty remedies" which they are not competent to provide. This result would contravene the mandate of Article III, § 2 of the United States Constitution which grants exclusive jurisdiction over pure maritime matters to federal district courts.

The savings to suitors clause, 28 U.S.C. § 1333, permits seamen to bring their Jones Act and general maritime law claims in state court as "law claims." Admittedly, the federal courts and state courts have concurrent jurisdiction over law claims because the common-law is competent to provide remedies "at law." However, once a seaman elects to bring his claim as a pure admiralty claim, he chooses to bring his cause within the exclusive jurisdiction of the federal district courts and thus makes it removable pursuant to 28 U.S.C. § 1441. The common-law cannot provide admiralty remedies.

There can be no question that a seaman has a choice between state and federal court. However, this choice has long been recognized as an election between (1) pursuing a claim as a pure admiralty claim in federal court with an Article III judge as the fact finder or (2) pursuing a law claim in either state or federal court with a jury. Yates v. Dann, 233 F.2d 64 (3rd Cir. 1955); Balado v. Lykes Bros. S.S. Co., 179 F.2d 943 (2d Cir. 1950); McCarthy v. American Eastern Corp., 175 F.2d 724 (3rd Cir.), cert denied, 338 U.S. 868, 70 S.Ct. 144 (1949), Gilmore & Black, the Law of Admiralty, Second Edition (1975), p.343.

A state district judge should not constitutionally be permitted to sit in admiralty and provide remedies which are peculiar to the federal courts. If the Fifth Circuit decision remanding this pure admiralty claim to state court is upheld, the ultimate goal of the framers of the Constitution to promote uniformity in maritime matters and to encourage shipping will be frustrated. Romero v. International Term. Operating Co., 358 U.S. 354, 373, 79 S.Ct. 468 (1959); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S.Ct. 406 (1959). International mariners will then be at the mercy of elected state district court judges relative to admiralty remedies. Predictability and uniformity will certainly suffer and, as such, the Louisiana legislature and its judicial system will be permitted to develop their own system of maritime law.

The Louisiana Supreme Court has already done so in Chester J. Orgeron, Jr. v. Avondale Shipyards, Inc., 561 So.2d 38 (La. 1990) 89-C-1445 where it held that a work pontoon was a "vessel" under maritime law in direct conflict with specific federal admiralty cases holding that work pontoons were not vessels. Ducrepont v. Baton Rouge Marine Enterprises, Inc., 877 F.2d 393 (5th Cir. 1989); Fleming v. Port Allen Marine Services, Inc., 552 F.Supp. 27 M.D. La. 1982; Mayfield v. Wall Shipyard, Inc., 510 F.Supp. 605 E.D. La. 1981; Bernard v. Bennings Construction Co., Inc., 741 F.2d 824 (5th Cir. 1984).

In Spencer Parker v. Rowan Companies, Inc., 591 So.2d 349 (La. 1991), on rehearing, 599 So.2d 296 (La. 1992) the Louisiana Supreme Court originally held that both plaintiff and defendant had a right to jury trial in a Jones Act and general maritime law claim brought in state court as a law claim pursuant to the savings clause. This result was correct because a common-law remedy, saved pursuant to the savings clause, includes a right to trial by jury. However, on rehearing, the Supreme Court reversed itself and essentially concluded that state district judges could sit both as the finder of fact and law in Jones Act cases brought pursuant to the savings clause. The Spencer Parker decision again demonstrates the Louisiana Supreme Court's complete disregard of the established federal law.

2. Plaintiffs' Designation Takes Their Claim Out Of The Saving To Suitors Clause

The designation of a plaintiffs' cause of action as being admiralty or maritime invokes the exclusive admiralty jurisdiction of the United States courts, to the exclusion of an action "at law," even if in the same pleadings the plaintiff characterizes his claim as an action at law. T.N.T. Marine Services, Inc. v. Weaver

Shipyards, 702 F.2d 585 (5th Cir. 1983). In T.N.T. Marine Services, the Fifth Circuit held that the district court properly denied the plaintiff a jury since the claim was under the court's admiralty jurisdiction by reason of the plaintiff's elective designation. In the instant case, the effect of the Lintons' designation of their claims as pure admiralty claims is to withdraw their request for a remedy under the savings clause which allows only an action at law, and assert an action under the first clause of 28 U.S.C. § 1333, which states, in pertinent part:

> The district court shall have original jurisdiction, exclusive of the courts of the states, of: (1) any civil action of admiralty or maritime jurisdiction...

In federal court the effect of taking the case out of the savings clause is to place it within the admiralty jurisdiction of the same court. Whereas admiralty jurisdiction resides in the courts of the United States exclusive of the courts of the states, the effect of taking the claim out of the savings clause in state court is to divest the state court of the only jurisdiction which it could have exercised. State Courts can only acquire jurisdiction of maritime matters through the savings clause which provides for actions "at law" and not in admiralty. Durden v. Exxon Corp., 803 F.2d 845 (5th Cir. 1986).

In Durden, supra, the court explained in footnote 10:

> With the unification of admiralty rules, it was necessary to preserve those historical procedures traditionally attached to actions in admiralty, not the least of which was the non-jury trial. The solution that was applied was the preservation in Rule 9(h) of that plaintiff's right to choice the procedural consequences of a civil or admiralty

> action, by choosing the jurisdictional basis of the action and designating that basis in the complaint.

803 F.2d at 849, n.10.

Both Durden and T.N.T. Marine demonstrated that a plaintiff waives his common-law remedy on the law side of federal court if he designates his claim as a pure admiralty claim. Similarly, a claimant waives that desire i.e., any desire to pursue a common-law remedy at law in state court, if he designates his claim as such.

The invocation of the exclusive admiralty jurisdiction goes far beyond a procedural rule, but rather bears on subject matter jurisdiction itself. Both T.N.T. Marine and Durden are substantive admiralty law which must be applied to both federal and state court (saved) admiralty suits.

3. State Court Lacks Jurisdiction To Adjudicate Plaintiffs' Admiralty Claims

The savings clause has long been construed to afford litigants a choice of remedies, not forums, and "it is not a remedy in common law courts which is saved, but a common law remedy." Metropolitan Dade County v. One Bronze Cannon, 537 F.Supp. 923 (S.D. Fla. 1982). Article III, § 2 of the Constitution and the savings clause mandate that the common-law (state court) is not competent to provide exclusive admiralty remedies.

In Vatican Shrimp Company v. Solis, 820 F.2d 674 (5th Cir. 1987), the Fifth Circuit recognized that a seaman has a right to pursue a common-law remedy in state court pursuant to the savings clause, however, the state court was not competent to provide any admiralty remedy such as limitation of liability.

Similarly, the state court is not competent to give any other pure admiralty remedy, which includes a non-jury trial of a maritime claim. State courts are only competent to provide remedies "at law" which includes a right to jury trial. Yates v.Dan, supra, Balada v. Lykes, supra, McCarthy v. American Eastern, supra.

When the Louisiana legislature was in the process of enacting Article 1732(6), it became clear in the legislative history that the state was attempting to create a "state admiralty and maritime jurisdiction" which can have no constitutional foundation. In Heinhuis v. Venture Associates, Inc. of Louisiana, 558 So.2d 1244 (1st Cir. 1990), the First Circuit Court of Appeals analyzed Louisiana Code of Civil Procedure, Article 1732(6) and the legislative history behind its enactment: "Now Louisiana has a statute which is the equivalent of Rule 9(h) in the federal court system." Footnote 2 in Heinhuis restates the comments by Louisiana representative Hunt Downer wherein he states that Article 1732(6) is an attempt to "track" exactly the federal rules of procedure.

In federal court, a plaintiff in a Jones Act suit who makes a 9(h) designation brings his suit in admiralty on the admiralty side of the court. The case is tried before the federal judge. In state court, a counterpart to 9(h) can have no constitutional foundation because a Jones Act litigant does not have the right to bring suit in state court on the admiralty side of a jurisdiction exclusively reserved to the federal courts. Romero v. International Terminal Operation, 79 S.Ct. 468 (1959)

4. Fifth Circuit Incorrectly Interprets The Removal Statute

In the instant case, the Fifth Circuit noted that Lintons' maritime claims might be removable if diversity of citizenship existed. The court relied on its prior decision in In Re: Dutile, 935

F.2d 61, 62-63 (5th Cir. 1991) which interpreted the removal statute, 28 U.S.C. § 1441, as precluding removal of In Rem maritime claims absent diversity. The Dutile panel, as followed by Linton, incorrectly interprets the second sentence of § 1441(b) as an expressed exception to removable actions under § 1441(a), which provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. [emphasis added]

Section 1441 (b) provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.[emphasis added]

Dutile reasons that the second sentence of § 1441 (b) is one of the exceptions referred to in the first sentence of § 1441 (a), and therefore precludes removal of pure admiralty actions absent diversity of citizenship.

Dutile's analysis of the removal statute is flawed. First, the language of § 1441 (a), "Except as otherwise expressly provided by Act of Congress," does not refer to other subsections of § 1441 itself. See Wright & Miller, Federal Practice & Procedure,

§ 3729, p. 489, (West 1985). That first sentence of § 1441 (a) refers to other Acts of Congress which have specifically designated certain federally created causes of action as non-removable despite the federal district court's original jurisdiction over such claims. For example, see 28 U.S.C. § 1445 (a), (b), and (c) where Congress specifically provides that actions against railroads, receivers and/or trustees of common carriers and actions arising under workman's compensation laws are not removable.

If Congress had meant for the second sentence of 1441(b) to be an exception to the general removal provision of 1441(a), the statute would have provided as such. The second sentence of § 1441(b) simply clarifies that diversity actions are not removable if the defendant resides in the forum state. It cannot be disputed that plaintiffs' designated admiralty and general maritime law claim is a civil action brought in a state court of which the district court has original and exclusive jurisdiction. 28 U.S.C. § 1333. Thus, the case is squarely within the provisions of § 1441(a) and removable.

5. Permitting Louisiana Code Of Civil Procedure Article 1732(6) To Deny Defendants Their Fundamental Right To Trial By Jury On "Law" Claims Brought Pursuant To The Savings Clause Interferes With Substantive Federal Rights And The Uniformity Of Maritime Law.

Permitting Article 1732(6) to deny defendants their fundamental right to trial by jury on claims brought "at law" pursuant to the "savings clause" would violate important federal substantive rights and disrupt uniformity. An important procedural rule, which is an integral part of the substantive federal rights of litigants, must be applied by a state court exercising concurrent jurisdiction under the savings clause. Garrett v. Moore - McCormick Company, 317 U.S. 239, 63 S.Ct. 246 (1942).

What is saved to suitors under the savings clause is saved to all litigants — plaintiffs and defendants. The United States Supreme Court explained:

> In cases of concurrent jurisdiction in admiralty and common-law, the jurisdiction of the latter is not taken away. The savings is for the benefit of suitors, plaintiff and defendant, when the plaintiff chooses to sue in the common-law courts. It certainly would not have been intended more for the benefit of the defendant than for the plaintiff, which would be the case if he could at his will force the plaintiff into a common-law court, and in that way release himself and his property from all the responsibilities which a court of admiralty can impose.

Waring v. Clarke, 46 U.S. (5 How.) 441, 12 L.Ed. 226 (1847)

Therefore, if the right to a jury trial is saved as an integral part of federal law with respect to claims brought at law, it is saved for defendants as well as plaintiffs.

The right to a trial by jury is deeply rooted and fundamental in the federal scheme of trying federal "law side" claims brought pursuant to the savings clause. By way of illustration, a seaman who seeks damages under the Jones Act and general maritime law in federal court has a choice: (1) designate his claim as a maritime claim under Rule 9(h) and have a federal judge as the finder of fact; or (2) bring the claim "at law" pursuant to the savings clause and obtain a jury trial. If the claim is brought "at law" pursuant to the savings clause, the 7th Amendment of the United States Constitution dictates that both plaintiff and defendant should have a right to jury trial. The 7th Amendment

contemplates that an action at law is an action wherein trial by jury is available in any civil suit where the amount in controversy is at least twenty dollars. See, Rachal v. Ingram Corporation, 795 F.2d 1210 (La. App. 5th Cir. 1986)(where the 5th Circuit recognized that a seaman is allowed to deprive a defendant of "its right to trial by jury" in a civil action only by amending his action to specifically engage the exclusive admiralty and maritime jurisdiction of the federal court pursuant to Rule 9(h)); Yates v. Dan, 233 F.2d 64 (3rd Cir. 1955)(where the 3rd Circuit held that the election recognized by the Jones Act is "between a trial by jury and a suit in admiralty"). See also Johnson v. Penrod Drilling Company, 469 F.2d 897 (5th Cir. 1972)

If the case is pending in federal court, the choice between a jury trial or a judge trial is not so harsh because either way each litigant enjoys the traditional federal constitutional safeguards: (1) an independent Article III judge will be the fact-finder; or (2) there will be a trial by jury in accordance with the 7th Amendment and Federal Rule of Civil Procedure 38. However, if federal law with respect to a defendant's right to trial by jury on civil claims brought "at law" is held not to govern the effect of a savings to suitors action in state court, state law will be permitted to prevail over both the exclusive grants of admiralty jurisdiction of Article III of the United States Constitution and the 7th Amendment.

In the present case, plaintiffs would like the choice of a state forum, which the election of a civil action "at law" would permit. But they also seek the "election of the procedural consequences" incident to admiralty, i.e. a judge trial, which is only available under the exclusive federal admiralty jurisdiction before an Article III judge. Stated another way, plaintiffs wish to deprive the defendants of their federal 7th Amendment right to trial by jury in an action at common law, while also depriving defen-

dants of the Article III forum guaranteed for admiralty and maritime proceedings.

One of the purposes of guaranteeing litigants an Article III forum and the constitutional safeguards inherent in that particular forum is that the federal judges are independent, serve for life and are not subject to the general political pressures associated with elected judges. This was amplified by Mr. Charles Warren in his Law Review Article entitled "New Light on the History of the Federal Judiciary Act of 1789" when he stated:

> "To annex to State Courts jurisdiction which they had not before, *as of admiralty cases*, and perhaps, of offenses against the United States, would be constituting the Judges of them, *pro tanto*, Federal Judges, and of course they would continue such during good behavior, and on fixed salaries, which, in many cases, would illy comport with their present tenure of office."

37 Harv.L.Rev. 49 (1923)

Also, Article III courts, just as state courts, are bound to apply federal law and uphold the principals of uniformity which are so important to a system of maritime law. However, if state courts are permitted to sit "in admiralty" as both judge and fact finder, international mariners will be at the mercy of the varying interpretations of the different state courts and the federal courts as it relates to pure admiralty claims. Obviously the concept of uniformity would be destroyed. To construe Louisiana Code of Civil Procedure Article 1732(6) to allow such a perversion of federal and constitutional guarantees is clearly unwarranted, unnecessary and unacceptable.

CONCLUSION

Plaintiffs' designation of their claims as pure admiralty claims, the clear equivalent of a Rule 9(h) designation, effectively withdrew their cause from the saving to suitors clause and brought the case within the exclusive jurisdiction of the federal district court. The Fifth Circuit's remanding of this matter to state court will significantly disrupt the ultimate goal of the framers of the Constitution to promote uniformity in maritime matters and is in direct conflict with the expressed provisions of Article 3 § 2 of the Constitution. Petitioner respectfully requests that certiorari be granted so that this important issue of federalism can be resolved.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that the appropriate number of copies of the above and foregoing has been forwarded to all counsel by placing a copy of same in the United States Mail, postage prepaid, this _____ day of September, 1992.

_____

EDWARD J. KOEHL, JR.

Appendix A

Donald Gregory LINTON,
Plaintiff-Appellant,

v.

GREAT LAKES DREDGE & DOCK COMPANY and Steamship Mutual Underwriting Association (Bermuda) Ltd.,
Defendants-Appellees

No. 90-4908

United States Court of Appeals,
Fifth Circuit.

June 22, 1992.

Seaman and spouse brought state court action against employer to recover for injury suffered while working as a seaman. Employer removed case. The United States District Court for the Western District of Louisiana, John M. Shaw, Chief Judge, denied motion to remand. Interlocutory appeal was granted. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that election of bench trial by designating suit as admiralty or general maritime claim did not automatically force case into exclusive admiralty jurisdiction.

Reversed with direction to remand to state court.

Before POLITZ, Chief Judge, REAVLEY, and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case is an interlocutory appeal of the district court's denial of Linton's motion to remand the case to state court. The district court based its denial of remand on grounds that the federal court had exclusive admiralty jurisdiction over Linton's Jones Act and general maritime claims because he had elected, pursuant to a Louisiana statute, to try those claims to a judge instead of a jury. For the reasons discussed below, the order of the district is reversed and the district court is directed to remand the case to the state court.

I.

On January 9, 1989, Donald Gregory Linton (Linton) and his wife, Telitha Linton, filed this suit in Louisiana state court against his employer, Great Lakes Dredge and Dock Company, seeking damages for personal injuries suffered while working as a seaman on the CONICAL, a dredge owned by Great Lakes. The suit was grounded on general maritime law and the Jones Act, 46 U.S.C. App. § 688. Linton's Fourth Supplemental and Amending Petition filed in state court designated his suit as "an admiralty or general maritime law claim" pursuant to LA.CODE CIV. PROC. ANN. art. 1732(6).[1]

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[1] LA.CODE CIV.PROC.ANN. art. 1732(6) (West 1990) provides:

> A trial by jury shall not be available in:
> (6) A suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal "saving to suitors" clause, if the plaintiff has designated that suit as an admiralty or general maritime claim.
> *Id.*

The essence of this case is the effect of such a designation. According to Linton, the designation is purely procedural: it simply allows the plaintiff the option of having his case tried to a Louisiana judge instead of a jury. Great Lakes cites language in the legislative history that indicates its purpose is to allow Louisiana law to track federal law.[2] It argues that an article 1732(6) designation is the same as a Rule 9(h)[3] designation under

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[2] "[I]n federal court if you file your admiralty action under the Jones Act, you, as the plaintiff or as the complainant, have the option of electing whether or not to have a trial by jury. In state court, if you file that same action using the saving to suitors clause invoking your federal maritime jurisdiction ...you may be entitled to the jury if you ask for it, others say it doesn't matter, if the defendant asks for it we may have a jury trial. So all I'm trying to do is track exactly the federal rules of procedure in essence saying you as the complainant or the seaman have the right to control the actions of whether or not you want a jury trial or not."

Heinhuis v. Venture Assoc., Inc., 558 So.2d 1244, 1246 (La.App. 1 Cir.), *writ den.*, 559 So.2d 1369 (La.), *motion den., writ den.*, 559 So.2d 1385 (La.1990) (citing remarks of Rep. Hunt Downer (sponsor of bill inserting paragraph (6) into article 1732) before La. House Civil Law & Procedure Committee, May 10, 1988).

[3] Rule 9(h) reads in pertinent part:

> A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims.

FED.R.CIV.P.9(h). Rule 38(e) states "[t]hese rules shall not be construed to create a right to trial by jury ...in an admiralty or maritime claim within ... Rule 9(h)." FED.R.CIV.P. 38(e).

the Federal Rules of Civil Procedure: it withdraws Linton's claims "at law" under the saving to suitors" clause and invokes the exclusive admiralty jurisdiction of the federal courts. On this basis, and pursuant to 28 U.S.C. § 1441,[4] Great Lakes removed the suit to federal district court. Linton promptly moved to remand pursuant to 28 U.S.C. 1447(c) contending that the case had been improvidently removed and that the district court lacked "the jurisdiction alleged by defendant." Following denial of Linton's motions to remand and for reconsideration, the district court again denied remand, holding that by virtue of Linton's designation of his claim as an "admiralty or general maritime claim," the federal court had exclusive jurisdiction in admiralty. *Linton v. Great Lakes Dredge & Dock Co.*, No. 90-1780, Amended Ruling at 3, 1990 WL 300831 (W.D.La.1990). The court also certified the order in accordance with the provisions of 28 U.S.C. § 1292(b). Linton timely petitioned this court for permission to appeal, which was granted, and this appeal followed.

II.

Our discretionary grant of an appeal in this case limits us to the sole question of the propriety of the district court's refusal to remand this case to the Louisiana court. See 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3929 at 143 (1977) (scope of issues open to court of appeals is closely limited to the order appealed from) (hereinafter *Wright & Miller*). This refusal is subject to appellate review. *See, e.g., In re Dutile*, 935 F.2d 61, 62 (5th Cir. 1991) (court

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[4] "[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant ... to the district court of the United States." 28 U.S.C. 1441(a).

granted application for writ of mandamus after district court refused to certify appeal of order denying motion to remand). Although it might appear that a plain reading of 28 U.S.C. § 1445(a) (Jones Act cases filed in state court are not removable) decides this case, we have nevertheless held that this statutory bar to removal may be waived by the plaintiff. *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116 (5th Cir. 1987). If, as Great Lakes argues, Linton's articles 1732(6) election amounted to election of an exclusive federal admiralty remedy, then that election was also a waiver of the bar to removal and we may not say that this case simply was not removable in the first instance. We, therefore, turn to examine the merits of the district court's refusal to remand this case. In examining the nature of these claims, we point out that Linton presents both general maritime and Jones Act claims. Each stems from different historical roots and, thus, we must consider them separately because these different origins bear directly upon the jurisdictional significance of a maritime plaintiff's election of a non-jury trial.

III.

We turn first to consider whether the general maritime claims asserted by Linton fall within the exclusive admiralty jurisdiction of the federal court if tried to the bench rather than to a jury. We begin by observing that one of the grants of judicial power in the Constitution is of "all Cases of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2. The 1st Congress implemented this grant in the following words:

> [T]he district courts ... shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction ... saving to suitors, in all cases, the right of a common law

> remedy, where the common law is competent to give it.[5]

Section 9 of the Judiciary Act of 1789 (cited in GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 1-9 (2d ed. 1975) (hereinafter *Gilmore & Black*); 14 *Wright & Miller* § 3671 at 408. Putting aside the complex question of just what fell within the "admiralty and maritime jurisdiction," it became clear as the case law evolved that

> a suitor who holds an *in personam* claim, which might be enforced by suit *in personam* in admiralty, may also bring suit, at his election, in the 'common law' court - that is, by ordinary civil action in state court, or in federal court without

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[5] The current version of the statute provides:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*

28 U.S.C. § 1333. The "saving to suitors" clause was changed by a 1948 revision of the statute. The Revision Notes state that "[t]he substituted language is simpler and more expressive of the original intent of Congress and is in conformity with Rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity." *Id.* Gilmore and Black are critical of this comment, saying: "[I]t seems unnecessary to comment on the claim of `simplicity.' As far as the 'intent of Congress' goes, it seems ... best to let the courts be the judges of that ... [or] at least to codify ... the main effect of the judicial decisions, which was to exclude the state courts from in rem suits."

reference to 'admiralty,' given diversity of citizenship and the requisite jurisdictional amount.

Gilmore & Black § 1-13; *see also* THOMAS AS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 3-13 (1987) (hereinafter *Schoenbaum*) ("Since the common law is competent in all cases where the suit is *in personam*, a plaintiff in such causes may elect either to proceed in admiralty or to bring an ordinary civil action, either at law in state court or in a federal district court under federal diversity jurisdiction (or some other basis of federal jurisdiction).").[6]

[1] Shortly after the War Between the States, the Supreme Court held that the *in rem* remedy was within the exclusive jurisdiction of the federal courts and that the states were not permitted such proceedings.[7] This holding was based on the premise that the *in rem* suit was not a "common law remedy." *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431, 18 L.Ed. 397

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[6] In much simplified analysis, we can classify admiralty claims as follows: 1) *in personam*, in which the defendant is a "person" (including corporations) and in which collection of a judgment involves tracing assets, garnishing them, etc. with all the attendant difficulties of collection; 2) *in rem*, in which a "vessel" (or other property) is the defendant and in which a judgment becomes a lien on the vessel (or other property) and may be enforced and collected by sale of the vessel (or other property), a sale which conveys title "good against the world." *Gilmore & Black* § 1-12.

[7] Furthermore, an action *in rem* is not available in an action "at law" in federal court. *See, e.g.*, 14 *Wright & Miller* §3672 ("[I]n rem jurisdiction ... is unavailable in actions at law in either the state or federal courts.") In support of its argument that Linton's article 1732(6) election removed the protection of the "saving to suitors" clause, Great Lakes correctly points out that "an *in rem* action is but one of the numerous admiralty remedies not available in an action 'at law';

(1867); *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555, 571, 18 L.Ed. 451 (1867); *Gilmore & Black* § 1-13. There was, however, no perceived bar to *in personam* suits in state courts. Schoenbaum states that the policy basis for concurrent jurisdiction is that "the common law courts had the power to hear such cases prior to the adoption of the Constitution." *Schoenbaum* § 3-13 n. 2. He points out that "[c]oncurrent jurisdiction is statutory, not constitutional, based upon the saving to suitors clause."[8] *Id.* Although the common law courts were allowed by Congress (by means of the "saving to suitors" clause) to continue to provide common law remedies, the substantive law applied had to be the general maritime law, as modified by Congressional action. *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384, 38 S.Ct. 501, 504, 62 L.Ed. 1171 (1918); *see*, e.g., *Pizani v. M/V COTTON BLOSSOM*, 669 F.2d 1084, 1087-89, 1088 n.2 (5th Cir. 1982) (*in personam* judgment of liability affirmed; damage award based on state and common law reversed and remanded for application of maritime rule). Remedies created by state statute could not be enforced by actions brought in state court under the "saving to suitors" clause if the

> legislation ... contravenes the essential purpose

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7 Continued state courts do not have concurrent jurisdiction over actions for limitations of liability or [various named statutes]." The counter to this point is, however, that in each of those instances the exclusive jurisdiction of the federal court is established by specific congressional action. The *in rem - in personam* distinction in respect to federal jurisdiction, in contrast, has developed through more than 100 years of case law.

8 Schoenbaum also points out that state law attachment, whereby a defendant's interest in property is seized to guarantee the defendant's appearance in court or seized and sold to satisfy a judgment, is "also saved to suitors under the saving clause." *Schoenbaum*, § 3-13 n.2.

> expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.

Southern Pacific Co. v. Jensen, 244 U.S. 205, 216 37 S.Ct. 524, 529, 61 L.Ed. 1086 (1917). However, if state legislation passes this test, or a common law right is widely recognized, it may be enforced, even by invoking the admiralty jurisdiction of the federal courts. 14 *Wright & Miller* § 3672.[9]

A

In its Amended Ruling, the district court refused to remand this case:

> The defendants argue that once [the article 1732(6)] designation was made, the plaintiffs effectively withdrew their request for a remedy under the saving to suitors clause and asserted an action within the exclusive federal admiralty jurisdiction, making the case removable pursuant to 28 U.S.C. § 1441. In view of the historical federal interest in creating a uniform body of maritime law, this court agrees. By making the Louisiana statutory counterpart of what is essentially a Rule 9(h) declaration ... the plaintiff essentially seeks a remedy in admiralty [which] the common law is not competent to give but which lies within the maritime jurisdiction reserved exclusively to the federal sovereign.

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[9]*Wright and Miller* cites the widespread use prior to 1970 of state wrongful death statutes to allow recovery within that state's navigable waters even though the general federal maritime law did not provide such a right to recovery. 14 *Wright & Miller* § 3672.

Linton v. Great Lakes Dredge & Dock Co., Amended Ruling at 3.

In breaking down further the district court holding, we can correspond its rationale to the arguments that are being made before us today. The Lintons' designation by which they "withdrew" their claim under the saving to suitors clause and "asserted an action within the exclusive federal admiralty jurisdiction" corresponds with Great Lakes' argument that Linton's article 1732(6) designation amounted to an *election* of an admiralty claim within the exclusive federal jurisdiction. The district court referred to article 1732(6) as the Louisiana "equivalent" of Fed.R.Civ.P. 9(h). We take this statement to mean only that the district judge was concluding that a choice of a non-jury trial of a maritime matter in state court would impermissibly create an admiralty docket in state court. This expression of the issue is, for our purposes today, only another way of saying that the choice of a non-jury trial of a maritime matter automatically transforms that matter into a true admiralty case over which the federal court has exclusive jurisdiction.

Further, the district court's statement concerning the inability of the common law to provide a non-jury remedy under the "saving to suitors" clause and the attendant exclusive federal jurisdiction, accords with the arguments by Great Lakes and Amicus, Maritime Overseas Corp., that a jury trial is such an

essential party of any "common law remedy" that, if dispensed with, whatever remedy remains is not a remedy the common law "is competent to give."[10]

B

In considering what we will denominate the "election" and "saving to suitors" arguments made against article 1732(6), we first examine the "saving to suitors" argument - that only jury trials are saved. Title 28 U.S.C. § 1333 no longer "saves to suitors" only a common law remedy. It now specifically saves "all other remedies to which they are otherwise entitled." *Gilmore & Black* states that "this quite unnecessary change in phraseology ... might imperil those decisions which ... exclude state courts from entertaining *in rem* proceedings." Gilmore & Black § 1-13. The professors then argue that *Madruga v. Superior Court*, 346 U.S. 556, 74 S.Ct. 298, 98 L.Ed. 290 (1954), "intimates that, by main force, the new language will be taken to mean the same thing as the old.[11] *Id.* They point out that the meaning of the revised language was not resolved by *Madruga* and that, in fact, the question as to whether the "saving to suitors" clause was *expanded* remains open. *Id.* The Revision Note states that

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[10] Great Lakes also argues that article 1732(6) is an attempt by Louisiana to create "an admiralty side of state court which can have no constitutional foundation." We address this argument later in this opinion. *See infra* nn. 12,13 and surrounding text. Amicus Maritime Overseas Corp. (Amicus or Maritime), presents Supremacy Clause and Seventh Amendment arguments that were not presented below. We will not consider those arguments here for the first time.

[11] "We take it that this change in no way narrowed the jurisdiction of the state courts under the original 1789 Act." Madruga v. Superior Court, 346 U.S. 556, 560 n.12, 74 S.Ct. 298, 301 n.12, 98 L.Ed.2d 290 (1954).

the revised language "is in conformity with ... [the abolition of] the distinction between law and equity." 28 U.S.C. § 1333 Revision Notes.

[2-5] *Madruga* affirmed the partition sale of a ship by a state court. 346 U.S. at 562, 564, 74 S.Ct. at 301, 303. The Court determined that not only was such a sale within the admiralty jurisdiction of the federal courts, *id.* at 560, 74 S.Ct. at 300, but also that the "saving to suitors" clause gave the state court concurrent jurisdiction of the disputed *in personam* partition action. *Id.* The Court stated:

> "Aside from its inability to provide a remedy *in rem* for a maritime cause of action, this Court has said that a state, `having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the `substantive maritime law.'"

Madruga, 346 U.S. at 561, 74 S.Ct. at 301 (citing *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124, 44 S.Ct. 274, 277, 68 L.Ed. 582 (1924)). *Red Cross Line* had specifically stated that:

> "The right of a common-law remedy," so saved to suitors, does not ... include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. *Knapp, S. & Co. v. McCaffrey*, 177 U.S. 638, 644 [20 S.Ct. 824, 827, 44 L.Ed. 921] [1990];

> *Rounds v. Cloverport Foundry & Mach. Co.*, 237 U.S. 303 [35 S.Ct. 596, 59 L.Ed. 966] [1915]. A state may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction. *The Hine v. Trevor*, 4 Wall. 555 [18 L.Ed. 451] [1867]; *The Glide*, 167 U.S. 606 [42 L.Ed. 296] [1897]. But otherwise, the state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit.

Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124, 44 S.Ct. 274, 277, 68 L.Ed. 582 (1924). We conclude, therefore, that a non-jury trial in state court is not, in and of itself, offensive to the general maritime law. Furthermore, a statutory provision for a non-jury trial, in and of itself (absent any pretense at *in rem* proceedings), does not constitute an attempt to create "an admiralty side of state court which can have no constitutional foundation."[12] We think that, particularly in view of the revised wording of the "saving to suitors" clause, the Supreme Court cases do not require a jury trial as an element of a "saving to

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[12] We do not address arguments that the Louisiana courts have held that a jury trial is guaranteed by Louisiana law. This argument was not made below and constituted no basis for the ruling of the district court. It is properly presented in Louisiana's courts.

[13] In a case involving *in personam* negligence and unseaworthiness claims by the widow of a *Sieracki* seaman, the Court stated that "Louisiana courts have broad jurisdiction of admiralty cases such as this and have frequently exercised it. [I]t is the duty of the Louisiana courts to adjudicate this case." *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731, 735, 87 S.Ct. 1419, 1422 18 L.Ed.2d 488 (1967). Although the case does not address the jury trial question, it does emphasize the concurrent jurisdiction of state and federal courts over in personam admiralty claims.

suitors" remedy. Stated differently, a maritime non-jury action is not necessarily outside the "saving to suitors" clause and within the exclusive admiralty jurisdiction of the federal courts.[13]

C

[6] We next examine the "election" argument in which Great Lakes argues that Linton, by designating his claim as an "admiralty and general maritime" claim under article 1732(6), necessarily "elected," albeit unwittingly, to pursue his cause of action as a Rule 9(h) "admiralty" claim within the exclusive federal jurisdiction. This argument has been correctly addressed in *Pellegrin v. International Independent Towing*, No. 88-5255, slip op. at 3-4 (E.D. La. March 6, 1989) in which the court stated:

> [W]hile the plaintiff's designation significantly affects state court procedure, it has no effect on state court (or federal removal) jurisdiction. Generally ... a plaintiff may elect to bring a maritime *in personam* action (1) "in admiralty," or (2) "at law." *E.g.*, 28 U.S.C. § 1333; *Leon v. Galceran*, 78 U.S. (11 Wall.) 185, 191 [20 L.Ed. 74] (1871).
>
> If the plaintiff elects to proceed "in admiralty," not only must he sue in federal court ... but he must also designate his federal claim as "an admiralty and maritime claim" under Federal Rule of Civil Procedure 9(h) .... Procedurally, the "9(h)" claim is tried before the court, not before a jury. *See* Fed.R.Civ.P. 38(e).
>
> On the other hand, if the plaintiff elects to proceed "at law," he has two options. First, he could sue on the "law side" of the federal court (*i.e.*, without a "Rule 9(h)" designation) if there

exists an independent, nonadmiralty basis of jurisdiction. Procedurally, the "law" claim could be tried by a jury. *See* U.S. Const. amend. VII; Fed.R.Civ. P. 38(a). Second, plaintiff could sue "at law" in state court. Procedurally, whether he, or the defendant, would have a right to trial by jury would depend on state civil procedure. In Louisiana, the governing procedural provision is [article 1732(6) and under that provision] the defendant has no right to a jury trial if plaintiff designates his claim as an "admiralty or maritime" claim [citation omitted.]

This procedural consequence is the sole effect of an article 1732(6) designation; it has no jurisdictional significance. The designation simply cannot transform the basis of state court jurisdiction from "law" jurisdiction to "admiralty jurisdiction .... Because admiralty jurisdiction is exclusively federal, a true "admiralty" claim is never cognizable in state court; no "designation" or state procedure can alter this. *E.g.*, *The HINE v. Trevor*, 71 U.S. (4 Wall.) 555 [18 L.Ed. 451] (1866) (Supremacy Clause prohibits true "admiralty" claims in state court).

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14 It is argued that the election of a non-jury trial is not solely "procedural" but that the Louisiana courts have said that article 1732(6) is "substantive" and affects a "fundamental" right to jury trial guaranteed by Louisiana law. This argument may be correct but the place for it is Louisiana's courts. *See supra* n. 12. Assuming that the article 1732(6) designation is *not* merely procedural, we still cannot

Id.[14] As noted above, only *in rem* admiralty claims (and certain statutory actions) are within the exclusive federal jurisdiction. Obviously the election under Louisiana law of a non-jury trial does not, alone, convert an *in personam* action at law to an *in rem* action in admiralty.

D

[7] Great Lakes next gives a constitutional twist to its argument that the "saving to suitors" clause applies only to actions tried to a jury: Because the "saving to suitors" clause, protecting actions at common law, is an act of Congress, the Seventh Amendment right to a jury trial in common law actions follows any maritime action "at law" under that clause. The abolition of that right by a state means, therefore, that the action becomes one outside the "saving to suitors" clause and within the exclusive federal admiralty jurisdiction even though not an *in rem* action.

Our holding above, to the effect that the "saving to suitors" clause, as amended and as interpreted by the Supreme Court, "saves" both jury and non-jury actions effectively applies to this argument. Nevertheless, we point out that the argument that Congress's creation of a federal right creates an appurtenant Seventh Amendment guarantee was rejected long ago by the Supreme Court when it affirmed a Federal Employer's Liability

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14Continued say the article presently affects the substantive *maritime* law: it provides a "means other than a proceeding in admiralty which may be employed to enforce the right or redress the injury involved," but does not alter the seaman's rights or redress available in connection with the injury sustained in maritime employment. *Red Cross Line*, 264 U.S. at 124, 44 S.Ct. at 277.

Act judgment based on a jury verdict, permitted by Minnesota law, that was rendered by 10 of a 12 person jury. *Minneapolis & S.L. R.R. Co. v. Bombolis*, 241 U.S. 211, 216, 36 S.Ct. 595, 596, 60 L.Ed. 961 (1916). Although the Seventh Amendment requires a unanimous verdict, the Court made clear "that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same." *Id.* at 217, 36 S.Ct. at 596.[15]

E

In sum, we see no reason why Linton may not pursue his maritime claims (considered alone and separately from his Jones Act claim) in Louisiana's courts under the "saving to suitors" clause regardless of the fact that those courts may or may not provide trial before a jury. Whether Linton's maritime claims are removable, then, depends on factors other than his election of a non-jury trial, including but not limited to, the citizenship of the parties, the amount in controversy, etc. See e.g., *In re: Dutile*, 935 F.2d 61, 62-63 (5th Cir. 1991) ("admiralty and maritime claims may be removed to federal court only by non-forum defendants and only where there is complete diversity of citizenship"). For the reasons set forth below, we find that Linton's maritime claims are not removable in this case.

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[15] We note that Amicus, Maritime Overseas Corp., argues that article 1732(6) violates the Fourteenth Amendment's equal protection clause "by denying [admiralty and maritime defendants] the jury trial right [Louisiana] affords defendants in analogous negligence and wrongful death cases arising under state law." This argument was not raised in the court below and is presented here for the first time. This argument deserves full briefing and adversary presentation. In any event, we will not decide the issue now.

[8] We next examine this appeal as it relates separately to the Jones Act claim: Whether the non-jury designation of this claim in state court characterizes it as an admiralty case within the exclusive federal jurisdiction.[16] We turn first to review briefly the relevant background of the Jones Act.

A

Before passage of the Jones Act, a seaman could not recover for injuries caused by the "the negligence of the master, or any member of the crew" although recovery was permitted for the seaman's injuries caused by unseaworthiness of the vessel, as well as for maintenance and cure. *The Osceola*, 189 U.S. 158, 175, 47 L.Ed. 760 (1903). In 1920, Congress passed the Jones Act which "in substance provided that a seaman injured in the course of his employment by the negligence of owner, master or fellow crew members could recover damages for his injures."

---

[16] Great Lakes also argues that its right to a jury trial in state court is guaranteed by the Seventh Amendment because the Jones Act is a federal law to which the right to trial by jury otherwise attaches. For the same reasons set out in analysis of this argument in connection with Linton's maritime claims, we reject it. The Seventh Amendment "applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same." *Minneapolis & S.L. R R. Co. v. Bombolis*, 241 U.S. 211, 217, 36 S.Ct. 595, 596, 60 L.Ed. 961 (1916). Furthermore, we have previously made it clear that only when a Jones Act claim is brought in *federal* court, under the "saving to suitors" clause, and based on *diversity* jurisdiction, does the Seventh Amendment give the *defendant* the right to elect a jury trial. *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1213, 1215-16 n. 8 (5th Cir. 1986). Otherwise, "the Jones Act gives *only* the seaman-plaintiff the right to choose a jury trial." *Id.* at 1215 (emphasis ours).

Gilmore & Black § 6-3. The Jones Act thus broadened the remedies of a seaman by incorporating by reference the Federal Employers' Liability Acts (FELA). *Id.* 6-26. "Under FELA any employee of an interstate carrier by rail may recover damages from the carrier for injury or death [resulting from the negligence of any of its officers, agents or employees, or from any defect in equipment.]" *Id.*[17] The Act concurrently provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; ....

46 U.S.C. App. § 688(a).

Thus the Jones Act provided the seaman an *alternative* ("at his election"), which is "an action for damages at law, with the right of trial by jury." Although the Jones Act does not expressly state the fact that the antecedent right implicit in the statute is that of a trial in admiralty, the Supreme Court has said "the statute leaves the injured seaman free ... to assert his right of action ... on the admiralty side of the court. On that side the issues will be tried by the court, but if he sues on the common law side there will be a right of trial by jury." *Panama R. Co. v. Johnson*, 264 U.S. 375,

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[17] FELA removed contributory negligence as a bar to recovery, but allowed a reduction of recovery based on the employee's comparative negligence. *Gilmore & Black* § 6-26. Assumption of risk as a defense was also eliminated in certain circumstances. *Id.*

391, 44 S.Ct. 391, 395, 68 L.Ed. 748 (1924). This court has said "[a] seaman having a Jones Act remedy may elect the remedy of a suit in admiralty or civil action at law." *Doucet v. Wheless Drilling Co.*, 467 F.2d 336, 339 (5th Cir. 1972) (citing *Panama R. Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924); *Balado v. Lykes Bros. S.S. Co.*, 179 F.2d 943, 945 (2d Cir. 1950); *McCarthy v. American Eastern Corp.*, 175 F.2d 724, 726 (3d Cir.), cert. denied, 338 U.S. 868, 70 S.Ct. 144, 94 L.Ed. 532 (1949).

B

[9] Great Lakes argues, as it does with respect to the general maritime claim, that by designating his claim as an "admiralty and maritime claim" and, thus, electing a non-jury trial in a Jones Act case in state court, Linton necessarily has chosen to proceed within the exclusive admiralty jurisdiction of the federal court. Great Lakes essentially argues that Linton's choices for trial of his Jones Act claim are exclusive: *either* 1) an admiralty trial, available only in federal court because, pursuant to Article III of the Constitution, there can be no state admiralty docket, *or* 2) an action at law, which *must* be tried to a jury, available in state or federal court.

We have explained the seaman-plaintiff's choice when he sues in federal court as follows:

> [T]he Jones Act gives only the seaman-plaintiff the right to chose a jury trial. With certain exceptions that are not involved here [limitation actions], a plaintiff has the right to select either an admiralty or a legal forum under the saving to suitors clause. The Federal Rules preserve this right by allowing the plaintiff to designate his action as one in admiralty or to treat it as a civil action.

Rachal v. Ingram Corp., 795 F.2d 1210, 1215 (5th Cir. 1986) (citations omitted). The statue makes it clear that the right to an "action for damages at law" protects the *seaman's* "right of trial by jury." *Rachal*, 795 F.2d at 1213, 1215; *see* 46 U.S.C.App. § 688(a) ("with the *right* of trial by jury"); *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444 (1943) ("[t]he right to trial by jury is part and parcel of the remedy afforded railroad workers under the ... Act'"); *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359, 360, 363, 72 S.Ct. 312, 315, 96 L.Ed. 398 (1952) (same).

[10] *Rachal*, in speaking of actions in federal court, further states: "In a nondiversity action under the Jones Act ... the seaman, on proper request, is entitled to a jury trial only by virtue of the Jones Act statutory grant." *Rachal*, 795 F.2d at 1213 (citing *Fitzgerald v. United States Lines*, 374 U.S. 16, 21 83, S.Ct. 1646, 1650, 10 L.Ed. 2d 720 (1963)). As we pointed out in that case, "when the initial complaint was filed [under federal question (non-diversity) jurisdiction in federal court] and the plaintiff chose a civil action, *the only right to a jury trial belonged to the plaintiff under the Jones Act.*" *Id.* at 1217. The seaman-plaintiff, however, is not compelled by the Jones Act to request a jury if he chooses to try his Jones Act claim in a civil action - it is simply a right that he possesses, and not the defendant.

[11,12] Thus, the Jones Act plaintiff can elect a non-jury trial in federal court either 1) by electing to sue in admiralty or 2) by grounding his suit on federal question jurisdiction, i.e., the Jones Act, and not requesting a jury. There is, therefore, no Article III bar to a non-jury trial of a Jones Act claim in an action at law. Therefore, we see no Article III, Seventh Amendment or federal statutory bar that denies the Jones Act plaintiff in state court the right to a non-jury trial if state procedure allows it.

[13] We may also reach the same conclusion - that there is no federal bar to a state non-jury Jones Act action - by applying the

saving to suitors clause. As the Supreme Court and our authority have observed, federal jurisdiction in admiralty over a Jones Act claim may be asserted under 28 U.S.C. § 1333. *See Panama R. Co. v. Johnson*, 264 U.S. 375, 391, 44 S.Ct. 391, 395, 68 L.Ed. 748 (1924) (seaman may assert Jones Act right of action on admiralty side of federal court). This same statute "sav[es] to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1). As we have explained above, there is no bar in the "saving to suitors" clause to a non-jury trial at law. Louisiana's statute allowing a non-jury trial of a maritime claim provides, therefore, a "remed[y] to which [Linton is] otherwise entitled" under that clause. We, thus, conclude that the Jones Act allows the injured seaman to elect a non-jury trial in an action "at law" in a state court, and such election does not, without more, convert the action to one in admiralty.

C

[14,15] We next consider whether Linton waived the statutory bar to removal of Jones Act cases when he designated his case as a non-jury admiralty matter under the Louisiana statue. 28 U.S.C. § 1445. Based on our analysis of Great Lakes' "election" argument, above, our analysis of the "election" argument in connection with Linton's "maritime" claim, set out in the text at III, C, *supra*, and our analysis of Great Lakes' Seventh Amendment argument, we conclude that the simple election of a non-jury trial by means of designating his Jones Act claim as an "admiralty or general maritime claim" did not automatically place Linton's case in the exclusive admiralty jurisdiction of the federal courts. Therefore, Linton's election of a non-jury trial in state court of a Jones Act claim did not amount to a waiver of the statutory bar to removal of Jones Act cases from state court. 28 U.S. § 1445. This Jones Act case was not removable in the first instance. *Id.* Neither were the associated maritime claims removable in this case because they are not "separate and

independent claims." 28 U.S.C. 1441(c); *Pate v. Standard Dredging Corp.*, 193 F.2d 498, 501 (5th Cir. 1952).

V.

Finally we note that the district court, in part, based its refusal to remand on "the historical federal interest in creating a uniform body of maritime law." *Linton v. Great Lakes Dredge & Dock Co.*, No. 90-1780, Amended Ruling at 3 (W.D. La. 1990). In this instance, Louisiana's article 1732(6) has no effect on the body of *maritime law* (including the Jones Act) and does not violate the strictures of *Jensen*. As noted in the discussion above, *in personam* admiralty actions have been within the concurrent jurisdiction of state and federal courts for some 200 years. The substantive federal admiralty law has been and remains applicable to such actions, including those affected by Louisiana's article 1732(6). There is no need to make a portion of such *in personam* actions removable to federal court in order to maintain the desired uniformity of admiralty law.

VI.

[16] We sum up: A non-jury trial in state court is not, in and of itself, offensive to the general maritime law, and - absent any pretense at *in rem* proceedings - does not constitute an attempt to create an admiralty side of state court. In view of the revised wording of the "saving to suitors" clause and Supreme Court authority, a jury trial is not a required element of a "saving to suitors" remedy. Stated differently, a maritime non-jury action is not necessarily outside the "saving to suitors" clause and within the exclusive admiralty jurisdiction of the federal court.

[17] Furthermore, "an article 1732(6) designation ... has no jurisdictional significance. The designation simply cannot transform the basis of state court jurisdiction from `law' jurisdiction

to `admiralty' jurisdiction." *Pellegrin v. International Independence Towing*, No. 88-5255, slip op. at 3-4 (E.D. La. March 6, 1989). The net effect of Linton's article 1732(6) election is solely that his maritime and Jones Act claims will be tried to the bench and not to a jury. This result does not cause those claims to fall out of the "saving to suitors" clause and into the exclusion federal admiralty jurisdiction. Nor does it amount to an abandonment of the plaintiff's right to file an action "at law" in state court and become an election to pursue an exclusive federal admiralty remedy.

[18] As to Great Lakes' argument that the Seventh Amendment guarantees a jury trial in any "saving to suitors" action in state court, we have found that the "saving to suitors" clause "saves" both jury and non-jury actions. More to the point, the argument that a federal right has an appurtenant Seventh Amendment guarantee applicable to state court proceedings was rejected long ago by the Supreme Court. *Minneapolis & S.L.R.R. Co. v. Bombolis*, 241 U.S. 211, 216, 36 S.Ct. 595, 596, 60 L.Ed. 961 (1916).

With respect to Great Lakes' Jones Act arguments: We hold there is no Seventh Amendment or federal statutory bar that denies the Jones Act plaintiff in state court the right to elect a non-jury trial. We also hold that the election of a non-jury trial in state court by a Jones Act plaintiff does not, of itself, automatically force the case into the exclusive federal admiralty jurisdiction.

There is no need to make *in personam* actions affected by Louisiana's article 1732(6) removable to federal court in order to maintain the desired uniformity of admiralty law. We reject the district court's conclusion to that effect.

The judgment of the district court denying remand was error; this case is not within the exclusive federal admiralty jurisdiction

and is not otherwise removable. The decision of the court below is REVERSED and the case REMANDED with direction to remand to the state court. REVERSED WITH DIRECTION TO REMAND TO STATE COURT.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

June 22, 1992

MEMORANDUM TO COUNSEL OF PARTIES LISTED BELOW

No. 90-4908 - Linton v. Great Lakes Dredge & Dock Co.

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.

The judgment entered provides that defendant-appellee pay to plaintiff-appellant the costs on appeal.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

BY:_____
Deputy Clerk

Enclosure

Appendix B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

Donald Gregory Linton	**Civil Action No. 90-1780**
vs.	**Section O - Judge Shaw**
Great Lake Dredge & Dock Co., et al	**Magistrate Methvin**

RULING

The defendant moved to remove this case to federal court on the basis that plaintiff's designation of his claims as an admiralty and general marine claim invokes the admiralty jurisdiction of federal court pursuant to article 3, section 2 of the United States Constitution and 28 U.S.C. § 1333(1). The plaintiff moved to remand, asserting that plaintiff's amended petition was merely electing a non-jury trial, a remedy recently granted them by the Louisiana legislature.

In order to consider the effect of plaintiff's designation of his suit as an admiralty or general maritime claim, this court shall briefly review the historical climate out of which the admiralty rules have evolved.

Article 3, section 2 of the United States Constitution provides "The judicial Power shall extend to all Cases of admiralty and maritime jurisdiction ...." Prior to the framing of the Constitu-

tion, the different state courts applied their own law in admiralty matters. Perceiving the need for uniformity in order to promote maritime commerce, the framers of the United States Constitution included within the judiciary article this clause extending federal power over admiralty and maritime matters. Similarly, Congress enacted 28 U.S.C. § 1933 which provides that district courts shall have original jurisdiction over any civil case of admiralty or maritime jurisdiction but "saving to suitors in all cases all other remedies to which they are entitled...." The first clause gives the federal courts power to hear any matter "in admiralty", continuing the Colonial admiralty court as one "side" of the federal court. Historically, the admiralty "side" differed from the law side in its special admiralty procedures and in that a litigant was not entitled to trial by jury on the admiralty side. Although the separate sides were merged in 1966 when the Federal Rules of Civil Procedure were amended, several procedural features, including the non-availability of jury trial remain applicable. The second clause, the "savings to suitors clause", provides for concurrent subject matter jurisdiction in state courts over most maritime matters. However, it has become apparent that judicial competence only has been "saved" by the savings to suitors clause. The states are not competent to apply their own substantive law to admiralty matters. *Garrett v. Moore-McCormack,* 317 U.S. 239, 63 S.Ct. 246 (1942). *See* Maraist, *Admiralty in a Nutshell*, Chapter 1.

In the case at hand, in their Fourth Supplemental and Amending Petition, the plaintiffs designated their claims as admiralty or general maritime law claims pursuant to Louisiana Code of Civil Procedure art. 1732(6) and withdrew their previous request for jury trial. This article is the equivalent of Fed. R. Civ. P. 9(h). *See Heinhuis v. Venture Assoc., Inc. of La.*, 558 So.2d 1244 (1st Cir. 1990). The defendants argue that once this designation was made, the plaintiffs effectively withdrew their request for a remedy under the savings to suitors clause and asserted an action

within the exclusive federal admiralty jurisdiction, making the case removable pursuant to 28 U.S.C. § 1441. In view of the historical federal interest in creating a uniform body of maritime law, this court agrees. By making the Louisiana statutory counterpart of what is essentially a Rule 9(h) declaration, the court believes the plaintiff essentially seeks a remedy in admiralty which the common law is not competent to give but which lies within the maritime jurisdiction reserved exclusively to the federal sovereign under the United States Constitution.

Lafayette, Louisiana, August 27, 1990.

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

Donald Gregory Linton	**Civil Action No. 90-1780**
vs.	**Section O - Judge Shaw**
Great Lake Dredge & Dock Co., et al	**Magistrate Methvin**

AMENDED RULING

The defendant moved to remove this case to federal court on the basis that plaintiff's designation of his claims as an admiralty and general marine claim invokes the admiralty jurisdiction of federal court pursuant to article 3, section 2 of the United States Constitution and 28 U.S.C. § 1333(1). The plaintiff moved to remand, asserting that plaintiff's amended petition was merely electing a non-jury trial, a remedy recently granted them by the Louisiana legislature.

In order to consider the effect of plaintiff's designation of his suit as an admiralty or general maritime claim, this court shall briefly review the historical climate out of which the admiralty rules have evolved.

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Article 3, section 2 of the United States Constitution provides "The judicial Power shall extend to all Cases of admiralty and maritime jurisdiction ...." Prior to the framing of the Constitution, the different state courts applied their own law in admiralty matters. Perceiving the need for uniformity in order to promote maritime commerce, the framers of the United States Constitution included within the judiciary article this clause extending federal power over admiralty and maritime matters. Similarly, Congress enacted 28 U.S.C. § 1933 which provides that district courts shall have original jurisdiction over any civil case of admiralty or maritime jurisdiction but "saving to suitors in all cases all other remedies to which they are entitled...." The first clause gives the federal courts power to hear any matter "in admiralty", continuing the Colonial admiralty court as one "side" of the federal court. Historically, the admiralty "side differed from the law side in its special admiralty procedures and in that a litigant was not entitled to trial by jury on the admiralty side. Although the separate sides were merged in 1966 when the Federal Rules of Civil Procedure were amended, several procedural features, including the non-availability of jury trial remain applicable. The second clause, the "savings to suitors clause", provides for concurrent subject matter jurisdiction in state courts over most maritime matters. However, it has become apparent that judicial competence only has been "saved" by the savings to suitors clause. The states are not competent to apply their own substantive law to admiralty matters. *Garrett v. Moore-McCormack*. 317 U.S. 239, 63 S.Ct. 246 (1942). *See* Maraist, *Admiralty in a Nutshell*, Chapter 1.

In the case at hand, in their Fourth Supplemental and Amending petition, the plaintiffs designated their claims as admiralty or general maritime law claims pursuant to Louisiana Code of Civil Procedure art. 1732(6) and withdrew their previous request for jury trial. This article is the equivalent of Fed. R. Civ. P. 9(h). *See Heinhuis v. Venture Assoc., Inc of La.*, 558 So.2d 1244 (1st Cir.

1990). The defendants argue that once this designation was made, the plaintiffs effectively withdrew their request for a remedy under the savings to suitors clause and asserted an action within the exclusive federal admiralty jurisdiction, making the case removable pursuant to 28 U.S.C. § 1441. In view of the historical federal interest in creating a uniform body of maritime law, this court agrees. By making the Louisiana statutory counterpart of what is essentially a Rule 9(h) declaration, the court believes the plaintiff essentially seeks a remedy in admiralty when the common law is not competent to give but which lies within the maritime jurisdiction reserved exclusively to the federal sovereign under the United States Constitution.

Additionally, in the opinion of the court this order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation. All proceedings in this case are STAYED pending resolution in the appeals court.

Lafayette, Louisiana, October 16, 1990.

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

Appendix D

Donald Gregory Linton	*** 16th Judicial District Court**
VS. NO. 83,037 "E"	*** Parish of St. Mary**
Great Lakes Dredge & Dock Co.	*** State of Louisiana**

FOURTH SUPPLEMENTAL AND AMENDING PETITION

NOW INTO COURT, through undersigned counsel come, DONALD GREGORY LINTON and TELITHA LINTON, who, pursuant to leave of Court granted by this Court files this Fourth Supplemental and Amending Petition and respectfully alleges, to wit:

1.

Plaintiffs wish to supplement and amend the original petition filed herein by amending paragraph 4 of the petition to read as follows:

4.

At all times hereinafter mentioned, there was in force and effect, the General Maritime Law, and an Act of Congress, 46 U.S.C.A. 688, commonly known as the Jones Act. The plaintiffs' suit is predicated upon an Admiralty and/or General Maritime Claim coupled with a claim brought under the Jones Act and is being brought under a Federal "Savings to Suitors" Clause. Accordingly, and for purposes of Louisiana Code of Civil Procedure, Article 1732(6), this suit is an Admiralty or General Maritime Claim under a federal law that is brought in State Court

under a Federal "Savings to Suitors" Clause and is specifically designated as an Admiralty or General Maritime Claim.

II.

By amending the prayer of the original and supplemental complaints to delete the original request for trial by jury.

WHEREFORE, plaintiffs pray that this Supplemental and Amending Petition be served on the defendants and that they be ordered to answer same within the legal delays permitted by law; then, after the lapse of all legal delays and due proceedings had that there be judgment herein in favor of the plaintiffs, DONALD GREGORY LINTON and TELITHA A. LINTON, and against all the defendants named in the original petition and as prayed for and in all supplemental petitions as prayed for and for all costs of these proceedings.

The plaintiffs, DONALD GREGORY LINTON and TELITHA LINTON further pray for any and all other equitable relief in the premises.

By Plaintiffs' Attorneys,

HUNTER & PLATTSMIER

By:_____

CHARLES B. PLATTSMIER
Bar #11021
P.O. Box 2464
Morgan City, LA 70381-2464
(504) 385-1904

Please serve defendants
through their attorney of record,
JEFFERSON R. TILLERY
Jones, Walker, Waechter,
Poitevent, Carrére & Denégre
Place St. Charles
201 St. Charles Avenue
New Orleans, Louisiana

CERTIFICATE

I hereby certify that the above and foregoing Motion for Leave to File Supplemental and Amending Petition and Supplemental and Amending Petition have been served upon all counsel of record by placing a copy of same in the United States Mail, postage prepaid and properly addressed on this 26th day of June, 1990.

CHARLES B. PLATTSMIER

Appendix E

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

Donald Gregory Linton	**Civil Action**
versus	**NO. CV 90-1780**
Great Lakes Dredge & Dock Co.	**Section "O"**

NOTICE OF REMOVAL

Defendant, Great Lakes Dredge & Dock Company and Steamship Mutual Underwriting Association, Limited, file this notice of removal of the captioned case from the 16th Judicial District Court, Parish of St. Mary, State of Louisiana, in which it is now pending, to the United States District Court for the Western District of Louisiana. This removal is predicated upon this court's original and exclusive jurisdiction over admiralty and maritime claims pursuant to Article III Section 2 of the United States Constitution and 28 U.S.C. Section 1333 and is authorized by 28 U.S.C. Section 1441.

1.

The cause bearing the captioned title was originally filed in the 16th Judicial District Court, Parish of St. Mary, State of Louisiana, Civil Action No. 83,037 (E) on January 9, 1989.

2.

The plaintiffs' original petition and first three supplemental petitions seek damages for personal injuries allegedly sustained by Donald Linton against Great Lakes Dredge & Dock Company and Steamship Mutual Underwriting Association Limited pursuant to the Jones Act, 46 U.S.C. Section 688 and the General Maritime Law.

3.

On June 26, 1990, plaintiffs filed a motion and order for leave to file a fourth supplemental and amending petition allegedly brought in state court under the federal saving to suitors clause but expressly designating their claims as admiralty and general maritime law claims pursuant to Louisiana Code of Civil Procedure Article 1732(6) and deleting their original demand for trial by jury, thereby seeking a remedy not otherwise saved by the saving to suitors clause and evoking pure admiralty jurisdiction.

4.

On June 27, 1990, the state district court granted plaintiffs' motion and order for leave to file fourth supplemental and amending petition and this order was served upon counsel for defendant on July 9, 1990.

5.

Defendants aver that plaintiffs' fourth supplemental and amending petition designating their claims as purely admiralty and general maritime law claims makes this cause removable pursuant to 28 U.S.C Section 1333 and Article III, Section 2 of the United States Constitution on the grounds that the federal district courts have original jurisdiction, exclusive of the courts

of the state, over any case of admiralty or maritime jurisdiction. In accordance with 28 U.S.C. Section 1446, defendants have filed this notice of removal within thirty days of receiving the order from which it was first ascertainable that the case is one which became removable pursuant to 28 U.S.C. Section 1333 and Article III Section 2 of the Constitution.

7.

Attached to this notice of removal are copies of all pleadings and orders served upon the defendants in the action filed in the 16th Judicial District Court for the Parish of St. Mary.

8.

Upon filing of the Notice of Removal, Great Lakes Dredge & Dock Company and Steamship Mutual Underwriting Association, Limited will promptly give written notice thereof to plaintiff, Donald Gregory Linton through his attorney of record and will promptly file with the Clerk of the 16th Judicial District Court for the Parish of St. Mary, State of Louisiana, a copy of this Notice of Removal of this action to this Court, as provided by law.

WHEREFORE, defendants, Great Lakes Dredge & Dock Company and Steamship Mutual Underwriting Association, Limited pray that this notice of removal be filed in accordance with law and that it be considered as good and sufficient and that the above captioned matter filed in the 16th Judicial District Court for the Parish of St. Mary be removed from said court to this Honorable Court for trial and determination as provided by law and that this court enter such order and issue such process as may be proper to bring before it copies of all records and proceedings in said civil action from the 16th Judicial District Court for the Parish of St. Mary and thereupon proceed with this civil action as if it had originally commenced in this Court.

Lafayette, Louisiana, this 27th day of July, 1990.

Respectfully submitted:

EDWARD J. KOEHL, JR. (#07805)
JEFFERSON R. TILLERY (#17831)
Jones, Walker, Waechter,
Poitevent, Carrére & Denégre
Place St. Charles
201 St. Charles Avenue, 47th Floor
New Orleans, Louisiana 70170-5100
Telephone (504) 582-8000

CERTIFICATE

I certify that a copy of the above and foregoing has been forwarded to opposing counsel by placing a copy of same in the United States Mail, postage prepaid, this 27th day of July, 1990.

EDWARD J. KOEHL, JR. (#07805)

Appendix F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-9225
USDC No. CA-90-1780"O"

DONALD GREGORY LINTON,

Plaintiff-Petitioner,

versus

GREAT LAKES DREDGE & DOCK CO.,

Defendant-Respondent

Petition for Leave to Take an Interlocutory Appeal

Before KING, GARWOOD and DUHE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the plaintiff's petition for leave to appeal the district court's interlocutory order of October 16, 1990, denying the motion to remand this case to state court is GRANTED.

OCT 16 1992
OFFICE OF THE CLERK

(2)

No. 92-537

In The

Supreme Court of the United States

October Term, 1992

GREAT LAKES DREDGE & DOCK COMPANY AND STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA), LTD.,

Petitioners,

versus

DONALD GREGORY LINTON and TELETHIA LINTON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES B. PLATTSMIER
HUNTER & PLATTSMIER

Bar #11021
P.O. Box 2464
Morgan City, LA 70381-2464
(504) 385-1904

Counsel for Respondents, Donald Gregory Linton and Telethia Linton

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

I.

Whether the Fifth Circuit Court of Appeals correctly reversed and remanded this matter to the District Court with instructions to remand same to the Louisiana State District Court from which it was removed upon a finding that a trial by jury in state court of a Jones Act and General Maritime Law claim is not required as a matter of federal law.

LIST OF PARTIES

The following are the parties who have an interest in this proceeding:

1. Donald Gregory Linton
   P.O. Box 248
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2. Telethia A. Linton
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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) The Merchant Marine Act (The Jones Act), 46 App. U.S.C. § 688(a) (West 1992):

> (a) Application of Railway Employee Statutes; Jurisdiction
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain, an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . .

(2) La. Code Civ. Proc. Art. 1732 (West 1988): A trial by jury shall not be available in:

(1) A suit where the amount of no individual petitioner's cause of action excess twenty thousand dollars exclusive of interest and costs.

(2) A suit on an unconditional obligation to pay a specific sum of money, unless the defense thereto is forgery, fraud, error, want, or failure of consideration.

(3) A summary, executory, probate, partition, mandamus, habeas corpus, quo warranto, injunction, concursus, worker's compensation, emancipation, tutorship, interdiction, curatorship, legitimacy, filiation, annulment of marriage, or divorce proceeding.

(4) A proceeding to determine custody, visitation, alimony, or child support.

(5) A proceeding to review an action by an administrative or municipal body.

(6) A suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal "saving to suitors" clause, if the plaintiff has designated that suit as an admiralty or general maritime claim.

(7) All cases where a jury trial is specifically denied by law.

(3) U.S. Const., Art.III, § 2,Cl.1. Jurisdiction of Courts: Section 2. The judicial power of the United States shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States and treaties made, or which shall be made, under their Authority; . . . To all Cases of Admiralty and Maritime Jurisdiction; . . .

(4) U.S. Const., 7th Amdt. - Civil Trials: In Suits in common-law, with a value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common-law.

(5) 28 U.S.C. § 1333. Admiralty, Maritime and Prize Cases (West 1992):

The District Court shall have original jurisdiction, Exclusive of the Courts of the State, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in call cases all other remedies to which they are otherwise entitled.

(6) 28 U.S.C. § 1445 (a) A civil action in any state court against a railroad or its receivers or trustees, arising out of sections 51-60 of Title 45, may not be removed to any district court of the United States.

STATEMENT OF THE CASE

Donald Gregory Linton, a seaman in the employ of Great Lakes Dredge & Dock Company sustained injury aboard one of his employer's vessels. Linton chose to

pursue a Jones Act claim for negligence and a General Maritime Claim for unseaworthiness and maintenance and cure against his employer/vessel owner in a Louisiana State Court. By an amended petition, Telethia Linton, his wife has been joined seeking recovery for her loss of consortium. The original petition sought a trial by jury.

During the course of the litigation, the plaintiff sought to avail himself of the Louisiana Code of Civil Procedure, Article 1732(6) which allows a plaintiff in a maritime action brought in state court to determine whether the matter should go to a judge or jury as the trier of fact. The plaintiff's request to delete the jury in this state court matter was granted by the state court judge. Within the appropriate delays, the vessel owner/employer filed a Notice or Removal pursuant to 28 U.S.C. § 1441. In response, the plaintiff/seaman filed a Motion for Remand in a timely fashion pursuant to 28 U.S.C. § 1447(c). The Honorable John M. Shaw, United States District Judge for the Western District of Louisiana (Lafayette/Opelousas Division) denied the plaintiff's Motion for Remand finding that removal was indeed proper. The District Court's ruling contained a statement that the order rendered involved a controlling question of law as to which there was a substantial ground for difference of opinion.

The plaintiff/seaman filed a petition for appeal pursuant to the provisions of Section 1292(b), Title 28 of the United States Code. The Fifth U.S. Circuit Court of Appeals granted the plaintiff's petition for appeal and, on June 22, 1992, the Fifth Circuit Court of Appeal reversed the ruling of the District Court issuing an opinion and

judgment which remanded the matter to the state court in Louisiana.

SUMMARY OF THE ARGUMENT

The petitioners in this matter have not shown any special reason, within the considerations governing a review of a writ of certiorari, why the court should grant this petition. The petitioner's contention begins with the proposition that the Louisiana Legislature encroached upon the original and exclusive maritime jurisdiction of the federal court when it provided a procedural device to allow the injured seaman seeking redress in a state court the exclusive ability to choose whether the fact finder was to be a jury or a judge. Rather than challenging the constitutionality of the statute through the state court system, the petitioners herein sought to give effect to what they earlier contended was an unconstitutional statute by removing the matter to the federal court system. The petitioners argue that the Fifth Circuit's holding in this matter, that actions brought in state court pursuant to the Savings Clause are not required to be tried before a jury, was erroneous. From that position, the petitioners seek to boot strap themselves into other constitutional arguments suggesting that such a ruling violates Article III, Section 2 of the United States Constitution or was an erroneous interpretation of the federal removal statute.

There is no basis for the proposition that a Jones Act or General Maritime Claim brought in state court pursuant to the Saving to Suitors Clause requires that the matter be tried by a jury. No statute nor decisional law

mandates such a conclusion. This is not "an important question of federal law which has not been, but should be, settled by" the United States Supreme Court. Accordingly, none of the criteria under Rule 10 of the Rules of the Supreme Court of the United States apply.

ARGUMENT

A. Certiorari Should Be Denied Because Petitioners Failed To Present Any Facts To Support The Allegation That Louisiana State Courts Are Developing Their Own Body Of Maritime Law.

State courts may assume subject matter jurisdiction over a federal cause of action absent a provision by Congress to the contrary or a disabling incompatibility between the federal claim and a state court adjudication. The state and national governments exercise concurrent sovereignty, although the constitution limits the powers of each and requires the states to recognize federal law as paramount. Federal law confers rights binding on state courts, the subject matter jurisdiction of which is governed in the first instance by state laws. A court must therefore begin with the presumption that state courts enjoy concurrent jurisdiction. *Gulf Offshore Company v. Mobil Oil Corporation*, 453 U.S. 473 69 L.Ed.2d 784, 101 S.Ct. 2870 (1981)

Federal courts are competent to adjudicate causes of action arising out of General Maritime Law pursuant to jurisdiction conferred by Article III, Section 2 of the United States Constitution and the enabling legislation, 28 U.S.C. § 1333(1). Federal courts also have the right to

adjudicate these causes of action when there is an independent basis for jurisdiction such as diversity of citizenship. State courts have concurrent jurisdiction over causes of action in personam which are founded in the General Maritime Law, inasmuch as 28 U.S.C. § 1333 saves "to suitors in all other cases all of the remedies to which they are otherwise entitled." It is beyond question that state courts must apply the same substantive law to a maritime case brought in that forum as would be applied in the federal court. *Southern Pacific Company v. Jensen*, 244 U.S. 205, 61 L.Ed. 1086, 37 S.Ct. 524 (1917)

The Supreme Court of Louisiana has formally acknowledged these principles. Indeed, in *Lavergne v. Western Company of North America, Inc.*, 371 So.2d 807 (1979) the Louisiana Supreme Court held that a plaintiff who brought an in personam action in state court based on General Maritime Law did have a right to trial by jury because the right to trial by jury is procedural in nature. The court held that affording the plaintiff such a right did not conflict with substantive admiralty law. The court stated:

> "It has long been established that a state court having concurrent jurisdiction with the federal courts as to in personam admiralty claims is free to adopt such remedies and to attach to them such incidence as it sees fit so long as it does not attempt to modify or displace essential features of the substantive maritime law." Id at 810

There has been no showing by petitioners that Louisiana state courts are attempting to develop a body of "maritime law" in contravention of the United States Constitution.

B. The Louisiana Statute Creates A Procedural Device For Selecting The Trier Of Fact

In 1988, the State of Louisiana, exercising its sovereign right to control procedures within its courts, amended Code of Civil Procedure Article 1732 to provide a new sub-part (6) to read as follows:

> "A trial by jury shall not be available in: . . . (6) A suit on an Admiralty or General Maritime claim under federal law that is brought in state court under a federal "Saving to Suitors" clause, if the plaintiff has designated that suit as an admiralty or general maritime claim."

In *Heinhuis v. Venture Associates, Inc. of Louisiana*, 558 So.2d 1244 (La. App. 1st Cir, 1990) the court interpreted Article 1732(6) and stated:

> "Obviously the amended petition was drawn in an attempt by plaintiffs to elect a non-jury trial, a remedy recently granted them by the Louisiana Legislature."

The court went on to explain the purpose of the statute as being purely procedural and quoted from the author of the bill during a committee hearing of the 1988 Louisiana Legislature. The author of the bill explained, in part:

> "House Bill 610 . . . is a simple bill. What it actually does . . . there is some inconsistency in the Louisiana jurisprudence compared to the federal jurisprudence with respect to rights of jury trials and maritime actions, particularly admiralty cases brought under the Saving to Suitors Clause.

* * *

> So, all I'm trying to do is track exactly the Federal Rules of Procedure in essence saying you as the complainant or the seaman have the right to control the actions of whether or not you want a jury trial or not."

Most recently in *Parker v. Rowan Companies, Inc.*, 599 So.2d 296 (La. 1992) the Louisiana Supreme Court on rehearing affirmed the reasoning displayed by the First Circuit Court of Appeals in the Heinhuis decision. The Supreme Court specifically stated,

> "In all events, it is our conclusion that the Legislature, in passing the amendment to Article 1732, intended to and did achieve for the plaintiff seaman the same exclusive choice of bench or jury trial in Jones Act cases in the state courts which prevails in federal court.
>
> * * *
>
> Granting a Jones Act seaman a right to a state court bench trial does not 'modify or displace the essential features of the substantive maritime law.' ". (Respondent notes and therefore advises the court that a Petition for Certiorari has been filed in the Parker matter now before this U.S. Supreme Court under docket number 92-221.)

From the foregoing it is clear that the Louisiana Supreme Court understands and intends to abide by Federal substantive maritime law. The petitioners' assertion to the contrary is not predicated upon any factual basis nor is it well founded in Louisiana's jurisprudence.

C. The Savings Clause Does Not Mandate A Jury Trial In A State Court Over Jones Act And General Maritime Law Claims.

As has been pointed out, Louisiana's purpose and intent in creating Article 1732(6) was simply to provide the plaintiff/seaman with the right to choose whether to try his claims to a fact finder consisting of a jury or to a judge sitting alone. *Parker v. Rowan Companies, Inc.*, supra In *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924) the U.S. Supreme Court stated:

> "The 'right of a common law remedy' so saved to suitors, does not . . . include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or redress the injury involved. . . . A state may not provide a remedy in rem for any cause of action within the admiralty jurisdiction. But otherwise, the state having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidence, as it sees fit." (Citations omitted).

The Fifth U.S. Circuit Court of Appeals acting in this matter concluded that:

> "A non-jury trial in state court is not, in and of itself, offensive to the General Maritime Law and – absent any pretense at in rem proceedings – does not constitute an attempt to create an admiralty side of state court. In view of the revised wording of the "Saving to Suitors" clause and Supreme Court authority, a jury trial is not a required element of a 'Saving to Suitors' remedy. Stated differently, a maritime non-jury

> action is not necessarily outside the 'Saving to Suitors' clause and within the exclusive admiralty jurisdiction of the federal courts.
>
> * * *
>
> We also hold that the election of a non-jury trial in state court by a Jones Act plaintiff does not, of itself, automatically force the case into the exclusive federal admiralty jurisdiction." *Linton v. Great Lakes Dredge & Dock Company,* 964 F.2d 1480 (5th Cir., 1992)

It is respectfully submitted that the Fifth Circuit acting in this matter has correctly interpreted Louisiana's intent when enacting Article 1732(6), a view which has been confirmed by the Louisiana Supreme Court's recent decision in *Parker v. Rowan Companies, Inc.*, supra. Further, the Fifth Circuit decision is perfectly in accordance with the Supreme Court's decisions in this area, specifically *Red Cross Line v. Atlantic Fruit Company,* supra. Accordingly, the Fifth Circuit has not decided an important question of federal law in a way that conflicts with applicable decisions of this Court.

D. Removal Was Never Proper And Was Not The Proper Vehicle for Challenging Article 1732(6)

Certiorari in this matter is totally unwarranted inasmuch as removal of this case from the state courts of Louisiana was totally improper. The sole and exclusive basis upon which removal was justified was that plaintiff's 1732(6) designation created a request for an exclusive admiralty remedy which permitted removal directly into the admiralty side of federal court. That position flies directly in the face of this Court's decision in *Romero v.*

International Terminal Operating Company, 358 U.S. 354, 3 L.Ed.2d 368, 79 S.Ct. 468 (1959) which made it clear that except in diversity cases, maritime litigation brought in state courts could not be removed to the federal system. This is also not an area where the Legislature has failed to act. Congress has expressly provided that Jones Act claims commenced in state court are not removable. 28 U.S.C. § 1445(a) As has been demonstrated, the Louisiana Supreme Court has held that it was not the Louisiana Legislature's intent in enacting 1732(6) to somehow create a right to maintain actions "in admiralty" in a state court forum. *Parker v. Rowan Companies, Inc.*, supra. If the petitioners in this certiorari request felt as though Article 1732(6) sought to create an admiralty side of state court or that it ran afoul of the Saving to Suitors Clause, then theoretically such an attempt by the Louisiana Legislature would be in violation of 28 U.S.C. § 1333, Article III, Section 2 of the United States Constitution, as well as the Supremacy Clause of the United States Constitution. Hence, such a piece of legislation would presumably be invalid and a challenge to such a piece of legislation would be through the state court system and then on writ of certiorari to the United States Supreme Court on constitutional grounds. Removal was clearly not the appropriate vehicle. To permit removal of this matter from a state court to a federal court on the perceived defect of 1732(6) as suggested by the petitioners herein would, in effect, breathe constitutional validity into an act of the state Legislature which, under the interpretation that the petitioners request that the Court provide to Article 1732(6), the Legislature is constitutionally prohibited

from doing! It is respectfully submitted that the defendants have attempted to utilize the guise of removal to circumvent their inability to seek an appeal of the interpretation of 1732(6) to a federal district court. Removal is not proper in this case and the Fifth Circuit decision below was correct when it stated:

> " . . . the election of a non-jury trial in a state court by a Jones Act plaintiff does not, of itself, automatically force the case into the exclusive federal admiralty jurisdiction. There is no need to make in personam actions affected by Louisiana Article 1732(6) removable to federal court in order to maintain the desire to uniformity of admiralty law. We reject the district court's conclusion to that effect. The judgment of the district court denying remand was error; this case is not within the exclusive federal admiralty jurisdiction and is not otherwise removable." *Linton v. Great Lakes Dredge & Dock Company*, 964 F.2d 1480 (5th Cir., 1992)

CONCLUSION

The petitioners have not demonstrated any special or important reasons why a writ of certiorari should be granted nor, specifically, have the petitioners identified any of this Court's criteria as set forth in Rule 10 which would cause this Court to exercise its discretion in favor of granting this request for certiorari. The Louisiana Legislature has created a procedural rule and has not attempted to invade the province of the Admiralty jurisdiction of this Court. The Fifth U.S Circuit of Appeals below has correctly determined that a non-jury trial in a

state court is not in and of itself offensive to the General Maritime Law. That decision is in accordance with prior Supreme Court cases which do not require a jury trial as an element of a "Saving to Suitors" remedy. Removal of Jones Act and General Maritime cases from the state court system has been prohibited both by Congress in the area of Jones Act litigation, and by the U.S. Supreme Court with regard to General Maritime claims (absent diversity of citizenship). Remand was improper and the Fifth Circuit's decision in that regard was correct.

Denial of the writ of certiorari in this matter will work no injustice in this case because a remand to the state court system is clearly proper. Further, this Court has before it on application for writ of certiorari, *Parker v. Rowan Companies, Inc.*, 599 So2d 296 (La. 1992) Pet. for Cert. filed under docket number 92-221, (U.S. July 31, 1992). Thus the Supreme Court's decision in *Parker* will directly affect the outcome of this case once it has been remanded to the state court system. For these reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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